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IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1994

EDWARD J. ANDRESS,

PETITIONER,

versus

MARVIN T. RUNYON,
POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD J. ANDRESS, Citizen pro Se
C/O EDWARD L. ANDRESS
3408 HULBERT AVENUE
ERLANGER, KENTUCKY 41018
(606) 727-2032

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the June 14, 1991 Agency action terminating Petitioner's affirmative action (Veterans preference) employment was collaterally reviewable *de novo* pursuant to 42 USC §2000e-16(c)? based on Respondent's failure to take final action on Petitioner's timely filed October 29, 1991 EEO Complaint[s] for discrimination matters related to that Action but, never litigated within the scope of 5 USC§7702(a)(2) by the U.S. Merit Systems Protection Board at the August 23, 1991 Hearing, or determined in the initial decision.. Andress v. U.S. Postal Service, CH0752910619 (November 5, 1991).

2. Whether the June 14, 1991 Agency action was the product of a conspiracy in fraud by Respondent's employees, including officials, purposed to interfere with Petitioner's fundamental and statutory civil rights; violative of 18 USC§1001; 29 USC § 794(a); 42 USC § 2000e - et seq; and guaranteed by the First; Fifth; and Eighth Amendments to the Constitution? who acted with class (handicap, race) based discriminatorily animus in the disguise of colorable authority to arbitrarily and discriminatorily inflict the maximum Agency penalty on Petitioner without cause for the ulterior

purpose of eliminating his legitimate EEO opposition activity.

3. Whether the September 30, 1991 state criminal prosecution of Petitioner (Ohio v. Andress, 91-CRB-18768) in Hamilton County municipal court was included in the June 14, 1991 conspiracy and violative of 42 USC § 1985(3); the Sixth; Thirteenth and Fourteenth Amendments to the Constitution? in furtherance of the conspirator's unlawful object, by expropriating Petitioner's immunity from false prosecution and the only remaining presumption of innocence to the specious accusation of assault upon which the entire Agency action rested.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Edward J. Andress - Citizen pro Se

   Petitioner / Appellant / Plaintiff

2. Marvin T. Runyan - Postmaster General of the United States

   Respondent / Appellee / Defendant

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D. The initial Opinion and Order of the federal district court for the Southern District of Ohio, entered on March 29, 1994.

E. The Magistrate's Report and Recommendation entered on February 3, 1994.

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EDWARD J. ANDRESS,

PETITIONER,

VS.

MARVIN T. RUNYON,
POSTMASTER GENERAL, USPS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

GROUNDS:

Petitioner, Edward J. Andress, respectfully petitions the Supreme Court of the United States of America that a writ of certiorari be issued to review the final Order of the court of appeals in Andress v. Runyon, 94-3474 (6th Cir. June 2, 1995). That Order denied Petitioner's April 21, 1995 Fed. R. App. P. 35 and 6th Cir. R. 14 Suggestion For Rehearing En

Banc, appealing the court of appeals' April 12, 1995 Opinion and Order affirming the district court's final Opinion and Order in Andress v. Runyon, C-1-93-207 (S.D. Ohio October 18, 1994). The final district court Order denied Petitioner's April 5, 1994 Fed. R. Civ. P. 60(b) Motion To Vacate Void Judgment entered on March 29, 1994.

Specifically, the court of appeals and the district court abused their discretion by affirming a Fed. R. Civ. 56 Summary Judgment in favor of Respondent on Petitioner's October 29, 1991 EEO Complaint[s] based solely on 5 USC § 7703 (b) (2), without providing a conclusion of law pursuant to Fed. R. Civ. P. 52 (a), as to why the EEO Complaint[s] referenced in the March 31, 1993 Complaint (C-1-93-207) Caption, was not actionable in the district court pursuant to 42 USC § 2000e-16(c), one hundred eighty (180) days after timely and Certified presentation to Respondent's designated EEO processing agent. (Appendix I.) It was collaterally capable of invalidating the June 14, 1991 Agency action, terminating Petitioner's affirmative action employment. Prior to their rulings, both lower courts were informed of precedent legal authority supporting the independent actionability of the EEO Complaint[s], notwithstanding the prior MSPB Appeal. Andress v. U.S. Postal Service,

CH0752910619 (April 22, 1992). (Appendix F.) The EEO Complaint[s] was not subject to the MSPB appellate jurisdiction of 5 USC § 7703 (b) (2). The EEO Complaint[s] has never been disputed or denied by the Respondent or his authorized representative.

OPINIONS BELOW

The Opinions below are listed and located in the Table Of Appendices. (ante, at p. iv.)

JURISDICTION OF THE SUPREME COURT

The initial Opinion and Order of the court of appeals for the Sixth Circuit in Case No. 94-3474 was entered on April 12, 1995, and the final Order on June 2, 1995.

The Supreme Court of the United States of America, has appellate jurisdiction to review the judgments of the courts below and the October 29, 1991 EEO Complaint[s] for equitable relief, presented to Respondent, whom has never denied their validity, pursuant to:

1) The Constitution, Article III, Sections 1 and 2;
2) 28 USC §1254(1);
3) S. Ct. R. 10.1(a) and (c).

CONSTITUTIONAL PROVISIONS

ARTICLE III, - 1787

Section 1. The judicial Power of the United States, shall be vested in one supreme court, . . .

Section 2. The judicial Power shall extend to all Cases in Law and Equity, arising under the Constitution, the Laws of the United States, . . .

BILL OF RIGHTS, - 1791

ARTICLE I.

. . . freedom of speech . . . and to petition the Government for a redress of grievances.

ARTICLE V. No person shall be . . . deprived of life, liberty, or property, without due process at law;

ARTICLE VI. In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed,

ARTICLE VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

OTHER AMENDMENTS

ARTICLE XIII, - 1865

Section 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV, -1868

Section 1.

. . . the equal protection of the laws.

STATUTORY PROVISIONS

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1. 5 USC § 7701. Appellate procedure
2. 5 USC § 7702. Actions involving discrimination

3. 5 USC § 7703. Judicial review of decisions of the MSPB
4. 18 USC § 1001. Statements or entries generally
5. 28 USC § 1254. Court of appeals; Certiorari; certified questions
6. 29 USC § 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations
7. 42 USC § 1985. Conspiracy to interfere with civil rights
8. 42 USC § 2000e-2. Unlawful employment practices
9. 42 USC § 2000e-3. Other unlawful employment practices
10. 42 USC § 2000e-11. Veterans preference
11. 42 USC § 2000e-16. Nondiscrimination in federal government employment
12. Ohio R. C. § 2903.13. Assault
13. 29 CFR. § 1613.641. Statutory right

STATEMENT OF THE CASE

A. Nature Of The Case

This case involves the second termination of Petitioner's Veterans preference employment with the USPS ("Agency") and a deliberate continuing violation of anti-discrimination (handicap, reprisal, race) laws, evidenced in the first termination by the same deciding Agency official. Andress v. Frank, C-1-89-511 (S.D. Ohio December 12, 1990).

It was designed to terminate Petitioner's employment. The *modus operandi* was:

1) handicap harassment prompting;
2) EEO activity;
3) subsequent progressive disciplinary action;
4) leading to termination of employment.

This same institutional Respondent damaged Petitioner, Twenty Thousand Dollars ($20,000) by the first employment termination in 1989.

B. Statement Of The Facts

Petitioner is a caucasian disabled Viet Nam Veteran, hired under affirmative action by the USPS on or about April 16, 1983; last working May 14, 1991, as a mailhandler at the 'Annex', 1623 Dalton Street, Cincinnati, Ohio. He informed the Agency through his employment application of a stress disorder - Post Traumatic Stress Disorder (PTSD) - as a result of gun shot wounds from hostile forces fire in the Republic of South Viet Nam, May 9, 1970.

Beginning in 1984, the supervisors in charge of Petitioner began using the color of their authority to make Petitioner's work place a hostile environment. In June 1986, Petitioner attempted to file his first EEO Complaint for handicap harassment, but the attempt was ignored by EEO Agent Darrell Brown. The EEO Office delayed processing the Complaint for almost one (1) year until the suggestion of court action got their attention to the matter in May of 1987. During that intervening one (1) year period, four (4) progressive disciplinary

actions were initiated against Petitioner. It was another year before the EEO Office decided on or about April 22, 1988, that there was no discrimination.

That Agency decision was appealed to the EEOC, and heard on October 24, 1988. The EEOC found Petitioner to be a qualified handicapped employee. Andress v. Frank, 220-88-5257X (May 12, 1989). On or about December 26, 1988, it was proposed that Petitioner should be removed from employment. On February 14, 1989, Supervisor William Thompson recorded his first termination of Petitioner's employment without cause. The U.S. Merit Systems Protection Board ("MSPB") reversed that administrative action because the Agency's charge could not be supported. Andress v. U.S. Postal Service, CH07528910302 (July 7, 1989). The EEOC Decision and the discrimination issues arising from the termination were appealed to federal district court. Andress v. Frank, C-1-89-511 (S.D. Ohio 1990). The institutional Defendant agreed to pay for settlement of the discrimination issues on December 12, 1990.

On January 2, 1991, Supervisor Leonard Adams recorded his first attempt to singularly remove Petitioner from employment without cause for his participation in an insubordinate protest *en*

masse (75 + employees) New Year's Eve 1990. Henceforth Adams began to harass Petitioner including a challenge to: "go outside"; and settle an interpersonal dispute at or about 3:15 P.M. on April 29, 1991. At that time, Petitioner requested to see an EEO Counselor. On May 3, 1991, Petitioner filed an EEO Complaint for indefensible handicap harrassment at the EEO Office. Adams initiated three (3) separate progressive disciplinary actions between April 29, 1991, and May 14, 1991.

On May 14, 1991, at or about 11:30 P.M., Petitioner was involved in a workplace fight with a black employee, Charles Worsham, on the southwest dock of 'A' Building. Worsham backed into Petitioner with a 7500 lb. forklift, without looking where he was going. Worsham had two (2) reckless driving encounters with Petitioner at 10:30 P.M. and 10:45 P.M., corroborated under oath by employees John Bradford and Dennis Gurley, respectively. Worsham cursed Petitioner at 10:45 P.M., corroborated by Gurley, when informed pedestrians have right of way. Worsham's own sworn testimony about the 11:30 P.M. incident was: "I'm not certain I didn't hit him"; with the forklift. Words were exchanged. Worsham came off the forklift to physically confront Petitioner. Blows were exchanged by the belligerents. Three (3) other

employees were in the vicinity of the fightscene: Dennis Gurley; David Grosser; and William Powell. Their sworn testimony about what they actually saw or rather did not see at 11:30 P.M. was:

Gurley:	"my view [of Petitioner] was blocked at the time";
Grosser:	"I presume he did. I didn't actually see the" (kick);
Powell:	"I heard a sound. I didn't actually see the punch."

At or about 11:31 P.M., the fight was over and Worsham threatened retaliation: "I'll get you"; corroborated under oath by Gurley. 1./ As Worsham was being restrained from further attack, Petitioner vacated the situation. At or about 11:43 P.M., Worsham submitted an official Statement to his supervisor accusing Petitioner of assault, without disclosing his hostile contact with Petitioner before the fight. Worsham initiated a criminal complaint with the Cincinnati Police at or about the same time.

On May 15, 1991, at 3:00 P.M. Supervisor Leonard Adams ordered Petitioner to immediately give a written account of the preceding night's event. Petitioner submitted the following statement:

1/. Petitioner submitted this hitherto undisputed evidence to the district court on August 12, 1993, in a Memorandum Of Evidence (at p. 6-7, 10-11) based on his first hand personal knowledge and affidavit of verification.

> "At 11:30 P.M. I was walking out. (05/14/91.) The forklift driver got on his forklift and backed into me. I asked him if he had a problem. He got off the forklift and struck me and I struck him back."

Adams ordered Petitioner to leave the premises and await further notice. On May 24, 1991, Adams mailed Petitioner a Notice Of Proposed Removal, based on Worsham's May 14, 1991 Accusation of assault.

On June 14, 1991, Supervisor William Thompson agreed with Adams' Proposal and mailed his second Notice Of Decision-Removal, to Petitioner within a twenty-eight (28) month period.

C. Course Of The Proceedings

On July 11, 1991, an appeal was filed with the MSPB and heard on August 23, 1991. Witnesses: Adams; Bradford; Grosser; Gurley; Powell; Thompson and Worsham, deposited their sworn testimony under direct and cross examination, pursuant to 5 USC § 7701(a)(1). Andress v. U.S. Postal Service, CH0752910619 (November 5, 1991). (Appendix G.) Petitioners affirmative defenses were:

1) handicap discrimination - mental (PTSD);
2) reprisal discrimination - May 3, EEO Complaint;
3) procedural error -incomplete investigation.

The Agency action was affirmed. Petitioner asked the full Board to review the lack of evidence against him. On April 22, 1992, the Board declined. (Appendix F.) The record closed August 23, 1991.

On September 30, 1991 the criminal complaint initiated May 14, 1991, by Worsham against Petitioner was tried in the Hamilton County municipal court in Cincinnati. Ohio v. Andress, 91-CRB-18768. Race was not considered in the MSPB Appeal or the Trial. Judge Donnellon was the judge and trier of fact:

> THE COURT: "Finding of guilty. Now it's quite obvious to me something is mushrooming this thing to a black and white incident. It's being controlled by the board down in the post office."

On October 29, 1991, Petitioner timely filed EEO Complaint[s] by Certified Mail (P 742 552 303) with Respondent's EEO Agent Darrell Brown, whom personally signed the Mail Receipt. (Appendix I.) 2./ It's elements, to wit:

1) that the May 3, 1991 EEO Complaint (P 290 930 804) was not answered;

2./ The Certified Mail Numbers referenced in the March 31, 1993 Complaint (C-1-93-207) Caption registered the transmittal of EEO Complaint[s] between Petitioner and Respondent's EEO Agent Darrell Brown on May 3, 1991 and October 29, 1991. For the sake of clarity and brevity they are combined on the latter date, referenced herein as the Complaint[s].

2) that there was a 'pattern and practice' of handicap discrimination conducted by Supervisor Adams beginning New Years Eve, 1990 [January 2, 1991], including a challenge to fight on April 29, 1991;

3) that the Agency removal action [June 14, 1991] was so tainted by untrue statements and unethical conduct that it was improperly motivated and retaliation for all past EEO actions [evidencing Andress v. Frank, C-1-89-511 (S.D. Ohio 1990)], damage paid on March 8, 1991;

4) that on September 30, 1991, Judge Donnellon [Ohio v. Andress, 91-CRB-18768] said "it was obvious to him that the board at the post office was making this a black and white issue [sic]". And a claim of race discrimination. William (Bill) Thompson respondent.

The EEO Complaint[s] was filed in the federal district court on May 15, 1992, with the MSPB Appeal. Andress v. U.S. Postal Service, C-1-92-417 (S.D. Ohio March 3, 1993). The jurisdictions of the EEO Complaint[s] and the MSPB Appeal were never mixed at the administrative level. Service of process was not perfected. The case was dismissed for lack of personam jurisdiction. There was no judgment on the merits. That dismissal was upheld by the court of appeals. Andress v. U.S. Postal Service, 93-3391 (6th Cir. October 21, 1993).

On March 31, 1993, the aforementioned EEO Complaint[s] was restyed and refiled in the district court with the MSPB Appeal.

Andress v. Runyon, C-1-93-207, (S.D. Ohio October 18, 1994). The October 29, 1991 EEO Complaint[s] was:

1) clearly displayed in the Caption according to the EEO Complaint[s] certified mail number;
2) invoking subject matter jurisdiction under 29 USC § 794(a) and 42 USC § 2000e-et seq.;
3) further explained in the twelfth (12th) administrative procedure;
4) cited as the sixth (6th) cause of action. (Complaint: at p.1, 2, 3, 5.)

On June 1, 1993, counsel for the Postmaster General motioned for Summary Judgement pursuant to Fed. R. Civ. P. 56 and 5 USC § 7703(b)(2), based on the untimeliness of the MSPB Appeal. Petitioner opposed that Motion on June 11, 1993, and filed a Memorandum on June 25,1993, (at p. 2) calling opposing counsel's attention to the unanswered EEO Complaint[s]. They continued to ignore the EEO Complaint[s]. Petitioner filed a Motion For Summary Judgment by default, pursuant to Fed. R. Civ. P. 55 and Memorandum Of Evidence on August 12, 1993, based on Respondent's refusal to plead to the EEO Complaint[s].

On January 20, 1994, an evidentiary Hearing was held by a Magistrate. Petitioner addressed the EEO Complaint[s] at that hearing. On February 3,1994, the Magistrate recommended that Respondent's Motion For Summary Judgment be

granted, based on the untimely filed MSPB Appeal in the district court pursuant to 5 USC § 7703(b)(2). And that Petitioner's entire Complaint be dismissed without mention of the EEO Complaint[s]. Petitioner timely motioned the court to review the Magistrate's Recommendation. (Appendix E.) On March 29, 1994, the district court denied Petitioner's Motion To Review and ordered Summary Judgment. (Appendix D.) On April 5, 1994, Petitioner motioned the district court to Vacate Void Judgment pursuant to Fed. R. Civ. P. 60(b).

Rule 60(b)(3) permits relief from a court order based on the intrinsic or extrinsic fraud of an adverse party. Rule 60(b)(4) permits relief if the judgment is void. In three (3) separate pleadings, June 1, 1994, June 28, 1994, and October 11, 1994, Petitioner noticed the district court that the Agency's assault charge was fraudulent from it's inception and that the EEO Complaint[s] was actionable, independent of 5 USC § 7703(b)(2). On October 11, 1994, Petitioner asserted that the court's March 29, 1994 Order and Opinion, was void without findings of fact and conclusions of law on the EEO Complaint[s], pursuant to Fed. R. Civ. P. 52(a). On October 18, 1994, the court denied Petitioner's Motion To Vacate Void Judgment, without addressing the issues of fraud or subject matter jurisdiction based on the EEO Complaint[s], pursuant to 42 USC § 2000e-et seq.

The case went to the court of appeals. Andress v. Runyon, 94-3474 (6th Cir. April 12, 1995). (Appendix B.) Petitioner argued that the district court had subject matter jurisdiction to collaterally review de novo the June 14, 1991 Agency action, based on the unanswered, unmixed EEO Complaint[s]. The counsel for Respondent submitted erroneous information to the court of appeals, suggesting that race discrimination was litigated by the MSPB, without offer of proof, contradicting Petitioner's true representation that it was not. Oral argument was requested by Petitioner but denied. The court did not address the EEO Complaint[s].

On April 21, 1995, Petitioner suggested a Rehearing En Banc pursuant to Fed. R. App. P. 35 and local rule 6th Cir. R. 14 for the purpose of appealing the April 12, 1995 Order. Petitioner presented four (4) questions to the court, to wit:

1. Did the counsel for Defendant-Appellee submit false information to [the court of appeals?
2. Did [that] court rely on that false information to the prejudice and harm of Plaintiff-Appellant in the formulation of it's Opinion and Order? (Appendix B)
3. Did the Sixth Circuit treat Plaintiff-Appellant's EEO Complaint (P 742 552 303) less favorably than the Fourth Circuits treatment of a very similarly situated Appellant in Rosenfeld v. Department of the Army, 769 F.2d 237 (1985)?

4. Is there a due process requirement guaranteed by the Fifth Amendment connecting the EEO Complaint to eligibility for judicial of its merits?

On June 2, 1995, the court of appeals dismissed the Suggestion without answering the questions. (Appendix A.)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. INTRODUCTION

This case revolves around an issue of due process, i.e., de novo review of a suspect discriminatory Agency action in federal employment pursuant to 42 USC § 2000e - 16(c). That issue has been ruled on in the Supreme Court. Chandler v. Roudebush, 425 U.S. 840,842,845 (1976). The Sixth Circuit's treatment of Petitioner's EEO Complaint[s] was far less favorable than the Fourth Circuit's treatment of an EEO complaint from a nearly identically situated plaintiff-appellant, relying on Chandler, supra, for its *ratio decidendi*. Rosenfeld v. Department of the Army, 769 F.2d 237 (4th Cir. 1985).

Both the instant case and Rosenfeld, supra, involved subject matter jurisdiction for collateral judicial review of employment termination under Title VII, based on subsequent EEO discrimination claims that were never litigated by a prior proceeding under 5 USC Government Organization and Employees.

The courts below, with respect to the EEO Complaint[s], had to determine:

1. Whether or not they were mixed with the MSPB Appeal under 5 USC § 7702(a)(2)?
2. Whether or not administrative res judicata estopped it?

The only discrimination matters litigated by the MSPB under 5 USC § 7702 (a) (2) were:

> [Whether] . . . "the agency's action discriminated him (Petitioner) because of a handicapping condition (service-connected stress disorder)" (Appendix G , MSPB initial decision at p. 8.) and;
> [Whether] . . . "the agency's removal action in this case was in reprisal for an EEO Complaint he filed on or about April 30, 1991." (Appendix G, MSPB initial decision at p. 9.)

They were the only discrimination matters subject to or conditioned by 5 USC § 7703(b)(2).

Leonard Adams' January 2, 1991 Disciplinary Request to remove Petitioner without cause and his perceived challenge to fight Petitioner on April 29, 1991, were not discrimination matters litigated by the MSPB. The latent race discrimination revealed on September 30, 1991, performed in support of an over-arching continuing violation of anti-discrimination laws, undoubtedly were not matters litigated at the August 23, 1991 MSPB Hearing. In fact the full EEO discrimination violation did not bloom until September 30, 1991.

The theory of a continuing violation was evidenced in the October 29, 1991 EEO Complaint[s] and the charge of "race discrimination" was clearly alleged against the deciding official William "(Bill) Thompson", based on Judge Donnellon's September 30, 1991 Statement of Fact. EEO Agent Darrell Brown undoubtedly received the EEO Complaint[s] by Certified Mail, evidenced by his signature on the Mail Receipt. (Appendix I.) The EEO Complaint[s] was exclusively governed by 42 USC § 2000e-16(c) and 29 CFR § 1613.641 (a)(2).

Assuming that the Fourth Circuit was correct:

> The holding in Chandler, permitting relitigation of the factual question of discrimination in federal court not withstanding prior rejection of the identical claim by the Civil Service Commission necessarily repudiates any res judicata or collateral estoppel effect for administrative findings. Rosenfeld, supra at p. 240.

neither the MSPB Appeal, nor the subsequent related court proceedings dismissed without prejudice to the merits, had a preclusive effect on the EEO Complaint[s]. The Respondent Postmaster General is bound by the willful failure of his EEO Agent, to process and answer the Complaint[s] in good faith after October 29, 1991. Irwin v. Dep't. of Veterans Affairs, 498 U.S. 90, 93 (1990).

BECAUSE the jurisdiction invoked by the October 29, 1991 EEO Complaint[s] was: 1) not mixed with the MSPB Appeal and; 2) not estopped by it's findings; pursuant to 42 USC § 2000e-16(c), the district court had collateral subject matter jurisdiction to review the June 14, 1991 Agency action terminating Petitioner's affirmative action employment.

B. SPECIFIC DISCRIMINATION VIOLATION[S]

The only factual question of discrimination in need of reconsideration for determination of all the discrimination violations evidenced in the EEO Complaint[s] is: who assaulted whom? between Worsham and Petitioner at 11:30 P.M. on May 14, 1991. The lower courts have declined to exercise their jurisdiction over the EEO Complaint[s] for an indigent non-member of their Bar. There is substantial, if not preponderant evidence and specific precedent legal authority, to conclude that as a matter of fact and law-Ohio R.C. § 2903.13, Worsham actually assaulted Petitioner with the forklift he was operating.

That question was the first (1st) cause of action to the district court on March 31, 1993. (Complaint: at p. 4.) And the last issue addressed to the court of appeals on April 21, 1995. (Suggestion: at p. 5.) Pursuant to Rosenfeld, supra,

it was not estopped by the MSPB finding on the assault charge, which was politically correct but judicially flawed.

On May 14, 1991, Worsham officially accused Petitioner of assault, to his supervisor, without disclosing his hostile personal contact before 11:30 P.M. Gurley's sworn testimony established Worsham's hostile state of mind toward Petitioner at 10:45 P.M., forty-five (45) minutes before the fight and diminished the accuser's credibility as a truthful witness. Worsham's own sworn testimony: "I'm not certain I didn't hit him"; affirmed Petitioner's allegation that Worsham did in fact hit him with the forklift at 11:30 P.M.

Johnson v. Hardnett, Ohio App 405 N.E. 2d 324 (1978), addressed the question of motor vehicle operators intimidating pedestrians by low speed contact with hostile intent and determined that such contact was expressly prohibited by public law necessary for maintenance of the peace, and therefore assault pursuant to Ohio R.C. § 2903.13.

Worsham's breaching of the peace with Petitioner was the flash point of the May 14, 1991 fight. Petitioner was punished to the maximum extent for fighting with Worsham. Worsham was not punished at all for assaulting Petitioner.

[1] The June 14, 1991 Agency action singularly terminating white Petitioner's employment for fighting with a co-belligerent black employee, Charles Worsham, on May 14, 1991, was racially discriminatory and violative of 42 USC § 2000e-2(a). Mc Donald v. Santa Fe Trail Transportation Co. 427 U.S. 273 (1976).

The discriminatory nature of Petitioner's employment termination, eliminated any possible just cause for the Agency action. One (1) termination without cause after EEO activity could be attributed to a mistake. Two (2) terminations without cause after EEO activity, within a twenty-eight (28) month period, evidence a cause and effect relationship. In light of the first Complaint: Andress v. Frank, C-1-89-511 (S.D. Ohio December 12, 1990), for handicap, reprisal and race discrimination; the Complaint styled as Andress v. Runyon, C-1-93-207 (S.D. Ohio 1994) represents a continuation of the prior violation, resuming January 2, 1991, three (3) weeks after settlement of Andress v. Frank, supra.

[2] The June 14, 1991 Agency action terminating Petitioner's employment for the second time without cause was the product of a continuing violation of anti-discrimination laws: 29 USC § 794 (a) and 42 USC § 2000e-et seq. Haithcock v. Frank, 958 F.2d 671 (6th Cir. 1992).

As a matter of law, Petitioner was immune to any false accusation of assault. Immediately after the fight, in which he was a co-belligerent, Worsham

threatened retaliation: "I'll get you"; corroborated under oath by Dennis Gurley. Worsham's official May 14, 1991 Statement, accusing Petitioner of assault, realized that threat. The statement was half true because Petitioner did strike Worsham during the course of the short fight, but essentially false without mention of Worsham's provocative misconduct with a motor vehicle between 10:30 P.M. and 11:30 P.M. on that day.

Worsham's untrue official Statement, submitted to his supervisor was:

1) subject to 18 USC § 1001;
2) instantly corrupting the due process function of the Agency entrusted by law to it;
3) knowingly made with reckless disregard of the whole truth;
4) material and intended to induce Agency reliance for the disciplinary action;
5) an unreliable basis for the Agency action.

United States v. Estus, 544 F. 2d 934 (8th Cir. 1976); United States v. Evans, 559 F. 2d 244 (5th Cir. 1977); United States v. Bedore, 455 F. 2d 1109 (9th Cir. 1972); United States v. Goldfine, 538 F. 2d 815 (9th Cir. 1976); United States v. Myers, 131 F. Supp 525 (D.C. Cal 1955).

Thompson recorded his intention to remove Petitioner without cause on February 14, 1989. Adams recorded his intention to remove Petitioner without cause on January 2, 1991. Worsham's false

accusation suited their predetermined purpose perfectly. An objective, complete and thorough investigation would have discovered that the preliminary material witness statements from Gurley, Grosser and Powell were nothing more than their presumptive conclusions based on what they heard, without visual confirmation. The entire controversy boiled down to Petitioner's word against Worsham's plus three (3) presumptive conclusions. All three (3) material witnesses to the May 14, 1991 fight, repudiated their preliminary statements under oath. (ante, at p.9.)

On June 14, 1991, Thompson's-Notice of Removal and Adams' May 24, 1991 Notice of Proposed Removal, implicitly and explicitly affirmed Worsham's untrue May 14, 1991 Statement accusing Petitioner of assault, without regard or knowledge of it's truth or rather lack thereof. The cause they stated for termination of Petitioner's employment was false. A statement recklessly made without knowledge of it's truth, but which in reality is false, is a false statement knowingly made within the settled rule. Cooper v. Schlesinger, 111 U.S. 148 (1884). 37 Am Jur 2d § 203 FRAUD AND DECEIT.

These three (3) fraudulent official writings violative of 18 USC § 1001 from the accuser, proposing and deciding Agency officials, were the

keys to a punitive disciplinary scheme, enabling Adams and Thompson to terminate Petitioner's employment on June 14, 1991, with colorable cause. In the Sixth Judicial Circuit, conspiracy criteria are:

1) an unlawful object to be accomplished;
2) a plan or scheme embodying the means to accomplish the object;
3) an agreement or understanding between two or more whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement or by any effectual means.

United States v. Bostic, 480 F.2d 965 (6th Cir. 1973). 15 A, C.J.S. CONSPIRACY § 1 et seq. Termination of Petitioner's employment without cause was the unlawful object. Punitive disciplinary action was the scheme. On June 14, 1991, all three (3) key people in the discipline scheme were in agreement and committed to termination of Petitioner's employment evidenced by their signatures on the prerequisite official writings. They discriminated against Petitioner with unity of purpose (Petitioner's removal) and concerted ill will (retaliation).

EEO activity in federal employment is protected by statute-42 USC § 2000e-3(a), and the First Amendment. Termination of employment without cause under circumstances that infer retaliation for EEO activity and subsequent court

action, violates the First Amendment. Arnett v. Kennedy, 416 U.S. 134, 161 (1974).

Termination of a non probationary federal employee without cause on a false charge, violates property and liberty interests, protected by the Fifth Amendment. Arnett, supra, 416 U.S. 134,151,152,157, 158.

The basic theme of equal protection is implicit in "cruel and unusual punishment". A penalty should be considered unusually imposed if it is administered arbitrarily or discriminatorily; and violative of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238, 249 (1972).

[3] On June 14, 1991, the Agency's continuing discrimination violation for the purpose of terminating Petitioner's employment formed a conspiracy in fraud violative of: 18 USC § 1001; the First; Fifth; and Eighth Amendments to the Constitution.

On August 23, 1991, Worsham testified under oath that he was cognizant of the fact that the state criminal prosecution of Petitioner was going to be dismissed by the Hamilton County municipal court on September 18, 1991. For undisclosed reasons it was not. On September 30, 1991, Judge Donnellon emphatically stated the outrageous interference of the "board down in the post office". They were manipulating a reversed form of racial bias to exploit the May 14, 1991 fight, as: "a black and white

incident"; to tip the scales of justice against Petitioner, expropriating the remaining presumption of innocence. The entire Agency action rested upon the May 14, 1991 Accusation of assault. The Hamilton County municipal court had competent and concurrent jurisdiction to speak on this matter and it's ramifications.

On September 30, 1991, the Hamilton County municipal court, recorded a prima facie violation of Petitioner's Sixth Amendment right to a fair criminal trial. Ohio v. Andress, 91-CRB-18768. Respondent can not rebut Judge Donnellon's Statement of Fact, evidencing the covert interjection of racial bias into that judicial process by Agency officials, who had related business with Petitioner in the Post Office. (ante at p.11.) Judge Donnellon did not know Thompson and Adams by name but succinctly registered their intention to prejudice the trial's outcome. The Fourteenth Amendment guarantees:

> "the equal protection of the laws";

to any defendant regardless of race in a state criminal prosecution. In McDonald, supra 427 U.S. 273, 288, Mr. Justice Marshall noted that the enforcement section of the Thirteenth Amendment:

> "prohibited any racial discrimination . . . against whites".

The conspiracy to provide colorable cause for terminating Petitioner's employment was motivated by class (handicap, race) based discriminatory animus of a retaliatory nature. The "board down in the post office" interfered with the duly constituted judicial authority of the state of Ohio, in it's prosecution of Petitioner, on the same charge that Thompson and Adams used to terminate Petitioner's employment. They wanted a determination of the May 14, 1991 assault charge in the state court, to be concurrent with and supportive of their administrative action. They expropriated Petitioner's immunity from false prosecution to achieve that result. Petitioner's essential livelihood was a meritorious privilege authorized by Congress. The conspirators were all bound by the Code of Ethics for all federal employees, requiring them to uphold the Constitution and other Laws of the Land. The actions of the Agency officials and the accuser were violative of 42 USC § 1985 (3). Griffen v. Breckenridge, 403 U.S. 88, 92-95, 97 (1971).

[4] The June 14, 1991 conspiracy included a malicious state criminal prosecution on September 30, 1991-Ohio v. Andress, 91-CRB-18768-based on Worsham's May 14, 1991 assault Accusation, violative of: 42 USC § 1985(3) the Sixth; Thirteenth; and Fourteenth Amendments to the Constitution.

CONCLUSION

WHEREFORE, Petitioner submits four (4) propositions of law in support of this Petition for a writ of certiorari, to wit:

1. That the federal district court abused its discretion in the October 18, 1994 Order, by ruling against Petitioner's April 5, 1994 Fed. R. Civ. P. 60(b) Motion to set aside the court's March 29, 1994 Order, dismissing Petitioner's entire Complaint (C-1-93-207) without hearing or addressing his October 11, 1994 Motion, summarizing the reasons: Rule 60(b)(3) - fraud; and Rule 60 (b)(4) - void judgment; why the EEO Complaint[s] qualified for judicial review independent of 5 USC § 7703(b)(2). Harris v. Callwood, 894 F.2d 1254, 1255,1256 (6th Cir. 1988).

2. That the district court usurped judicial power in the October 18, 1994 Order, when it affirmed a Fed. R. Civ. P. 56 Summary Judgment in favor of Respondent pursuant to 5 USC § 7703(b)(2) on the EEO Complaint[s], presenting timely charges and evidences of race discrimination and a continuing violation to the Respondent, that were never heard by the MSPB; denying Petitioner's due process right to be heard on the EEO Complaint[s], without giving a conclusion of law pursuant to Fed. R. Civ. P. 52 (a), as to why it was not actionable in the district court after one hundred-eighty (180) days

without final action taken by Respondent, pursuant to 42 USC § 2000e-16(c). Chandler; Rosenfeld, supra; United States v. Boch Oldsmobile Inc., 909 F.2d 657, 661 (1st Cir. 1990).

3. That the court of appeals failed to correct the prejudicial errors below and abused it's own discretion in the April 12, 1995 Order, by ruling on Petitioner's Appeal without the oral argument requested and without addressing the issue he presented to the court on November 21, 1994, to wit:

> Whether the adverse Agency administrative action terminating Appellant's employment was collaterally reviewable de novo based on timely but unanswered EEO Complaints (P 742 552 303; P 290 930 804) pursuant to 29 USC § 794(a) and 42 USC § 2000e-et seq. which provided subject matter jurisdictional grounds. . . independent of and not mixed with 5 USC § 7703(b)(2). (Appellant's Brief at p.2.)

and affirming the district court's Fed. R. Civ. P. 56 Summary Judgment in favor of Respondent when there remained a genuinely disputed issue of material fact: who assaulted whom? and the EEO Complaint[s], that Respondent received but has never denied at the administrative level which, until proven otherwise, qualified for judicial review as a matter of law - 42 USC § 2000e-16(c), pursuant to Chandler, and Rosenfeld, supra. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

BEST AVAILA

4. That the court of appeals' June 2, 1995 Order, denying a rehearing and consequently judicial review of the EEO Complaint[s], without answering questions about how the EEO Complaint[s] related to their judicial process, was contrary to the intent of Congress with respect to judicial review of final agency actions in general and in particular to that legislative intent expressed at 42 USC § 2000e-11, as it related to the June 14, 1991 Agency action against Petitioner, terminating a disabled Veteran's preferential employment without cause. Abbott Laboratories v. Gardner, 387 U.S. 136, 140,141 (1967); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 261& nn. 6-7 (1979).

The lower courts in the Sixth Circuit have made serious errors in judgment on the October 29, 1991

EEO Complaint[s], regarding due process and jurisdiction, which have caused conflict between decisions of the Supreme Court and the Judicial Circuits. Moreover the conflict is of sufficient gravity and general importance to warrant review by the Supreme Court.

THEREFORE, certiorari should be granted!

Respectfully submitted,

Edward J. Andress, Citizen pro se.

BLE COPY

AFFIDAVIT OF VERIFICATION

STATE OF OHIO)
) SS
COUNTY OF HAMILTON)

Petitioner, Edward J. Andress, being first duly sworn upon his affirmation, deposes and says that the above Petition For Writ Of Certiorari is a true and correct relation of the facts based on my first hand personal knowledge as a witness to:

1) The May 14, 1991 fight between Petitioner and Charles Worsham, at the Annex, 1623 Dalton Street, Cincinnati, Ohio;

2) The August 23, 1991 MSPB Hearing where Petitioner heard all the other witnesses give their sworn testimony about the matter in controversy;

3) The September 30, 1991 criminal prosecution of Petitioner in the Hamilton County municipal court, Ohio v. Andress, 91-CRB-18768.

Respectfully submitted,

Edward J. Andress,
1827 Walker Street
Cincinnati, Ohio

Subscribed and sworn to before me, a Notary Public on this 4th day of July, 1995.

NOTARIAL SEAL
STATE OF OHIO

Notary Public
My Comm. Expires Dec. 30, 1997

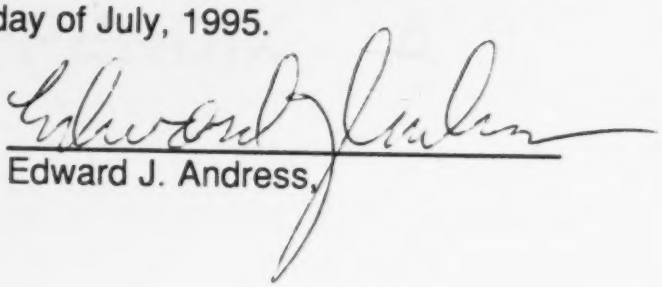
CERTIFICATE OF SERVICE

I, Edward J. Andress, hereby certify that I have mailed, by First Class U.S. Mail postage prepaid, a true copy of the foregoing Petition For Certiorari to:

Drew S. Day, III
Solicitor General
Department of Justice
10th & Constitution Ave.
Washington, DC 20530

Brian M. Reimer
Attorney/Appellate Div.
U. S. Postal Service
475 L'Enfant Plaza S.W.
Washington, DC 20260

and the original plus thirty-nine (39) copies to the Supreme Court of the United States, Office of the Clerk, One First Street, N.E., Washington, DC, 20543, this 7th day of July, 1995.



Edward J. Andress

No. 94-3474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD J. ANDRESS,

Plaintiff-Appellant,

v.

MARVIN T. RUNYON,
Postmaster General,
U.S. Postal Service

Defendant-Appellee,

ORDER

BEFORE: MARTIN and RYAN, Circuit Judges, and GILMORE*, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

* Hon. Horace W. Gilmore, Senior United States District Judge for the Eastern District of Michigan, sitting by designation

No. 94-3474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD J. ANDRESS,

Plaintiff-Appellant,

v.

MARVIN T. RUNYON,
Postmaster General,
U.S. Postal Service

Defendant-Appellee,

ORDER

BEFORE: MARTIN and RYAN, Circuit Judges, and GILMORE, District Judge.*

Edward J. Andress, a pro se Ohio resident, appeals a district court order dismissing his civil rights complaint filed pursuant to 5 U.S.C. § 7703 and multiple constitutional amendments. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary and injunctive relief, Andress sued the Postmaster General of the United States disputing Andress's removal from employment following an altercation with a black employee on June 14, 1991. Andress challenged his removal on the basis of handicap and race

discrimination. Andress pursued his case before the Merit Systems Protection Board (MSPB) which denied his claim after a hearing On November 27, 1991. On April 22, 1991, the MSPB denied Andress's petition for review. In it's April 22nd decision, MSPB notified Andress

*The Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

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that if he did not request a review before the Equal Employment Opportunity Commission, Andress had to file a civil action in the appropriate United States district court no later than thirty days after receipt of the notice.

On May 15, 1992, Andress filed a timely appeal in the United States District Court for the Southern District of Ohio. Subsequently, the complaint was dismissed for failure to properly serve the Attorney General. This court affirmed the dismissal on appeal. *Andress v. United States Postal Serv.*, No. 93-3391, 1993 U.S. App. LEXIS 27677, at *4-5 (6th Cir. Oct. 21, 1993).

While his appeal was still pending before this court, Andress filed a second complaint raising the same claims that he presented in his initial case. The parties filed cross-motions for summary judgment. Upon de novo review of a magistrate

judge's report and over Andress's objections, the district court granted summary judgment for the Postmaster General.

In his timely appeal, Andress continues to argue the merits of his complaint and contends that the district court erred by concluding that it lacked jurisdiction over his complaint. He request oral argument.

This court's review of an order granting summary judgment is de novo. *See EEOC v. University of Detroit*, 904 f.2d 331, 334 (6th Cir. 1990). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The district court properly concluded that it lacked jurisdiction over Andress's complaint. Andress was notified by the MSPB on April 22, 1992, that he had thirty days to file an appeal with a federal district court. Andress did not file his current complaint until March 31, 1993. The thirty day time period to file an appeal under 5 U.S.C. § 7703(b)(2) is a jurisdictional prerequisite for judicial review of an MSPB decision which cannot be extended. *Hilliard v. United States Postal Serv.*, 814 F.2d 325,326-27 (6th Cir. 1987); *see also Glarner v. United States Dep't of Veterans Admin.*, 30 F.3rd 697, 701 (6th Cir. 1994). Further, as Andress did not

file a timely appeal from the MSPB decision, the merits of his complaint are not reviewable on appeal.

Accordingly, we deny Andress's request for oral argument and affirm the district court's order. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EDWARD J. ANDRESS,	:	
Plaintiff,	:	
v.	:	ORDER DENYING PLAINTIFF'S MOTION TO VACATE VOID JUDGMENT
POSTMASTER GENERAL, MARVIN T. RUNYON	:	
Defendant.	:	

This matter is before the Court on the Plaintiff's motion to vacate void judgment (doc. 26), a supplemental memorandum by the Plaintiff in support of his motion (doc. 33), a motion by the Plaintiff to include the transcript of the administrative hearing (doc. 34), the Defendant's reply (doc. 37), and the Plaintiff's response (doc. 38).

BACKGROUND

The Plaintiff, a former United States Postal Service Worker, filed a claim against his employer with the United States Merit System Protection Board ("MSPB") on August 16, 1991. On November 5, 1991 the MSPB issued its initial decision in opposition to Plaintiff's position. On November 27, 1991 the Plaintiff filed objections to the decision and on December 10, 1991 he filed an official petition to review the decision. On April 22, 1992 the MSPB

denied the petition and informed the Plaintiff of their denial and his right to seek review.

The Plaintiff, Edward Andress, then had the option to file an action before the Equal Employment Opportunity Commission or file a civil action with this Court within thirty calendar days from

receipt of MSPB's notice. 5 U.S.C. § 7703 (b) (1989). On May 15, 1992 Mr. Andress elected the latter by filing Complaint No. C-1-92-417 against the Postal Service and four employees alleging handicap and race discrimination. Subsequently, Andress dismissed the four employees and filed amended complaints. Then on August 21, 1992 the United States Department of Justice filed a suggestion of improper service on the remaining defendant. Finding service improper the Magistrate Judge ordered Mr. Andress to show why the Magistrate should not dismiss his case. The Magistrate Judge then sent Mr. Andress Fed. R. Civ. P. 4 and ordered the Plaintiff to perfect service on Defendant Postmaster General within twenty days of receipt of the order. When Mr. Andress failed to comply, the Magistrate recommended dismissal of his complaint without prejudice. On March 3, 1993 we adopted the report and recommendation. Mr. Andress appealed and the Sixth Circuit affirmed our finding that Mr. Andress had failed to perfect

service of process within 120 days of filing his complaint. Andress v. United States Postal Service, No. 93-3391 (6th Cir. October 21, 1993).

While the Plaintiff's appeal was pending he filed this action containing the same claim. We held, on the Magistrate's recommendation, that filing the complaint again in a new case does not cure a procedural defect. While we understand that the Plaintiff has been proceeding pro se, as we said before, "the Plaintiff's pro se status cannot be viewed as a license to avoid the federal rules of civil procedure as well as the statute of limitations." (doc. 25).

The Plaintiff now moves to vacate the judgment as void. The Plaintiff alleges that dismissal of the case violated his due process rights and that the statute should have been tolled, thus allowing him to re-file.

DISCUSSION

A. Rule 60 (b) (4) motion to void judgment

The Plaintiff, moving pro se in this matter, failed to cite specific authority for his motion. It appears, however, that the Plaintiff has filed a Rule 60(b)(4) motion to set aside a judgment. This rule allows the court to void a judgment that has been rendered without proper jurisdiction of the person

subject matter or deprives an individual due process of the law. United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2862, at 198-200 (1973).

The moving party has a difficult burden to set aside a judgment as void. "A judgment is not void merely because it is or may be erroneous. . . . or because the precedent upon which it was based is later altered or even overruled. A judgment is void . . . [if] the court's action amounts to plain usurpation of power constituting a violation of due process." Id. at 661. Mr. Andress in this case alleges a violation of his due process rights. The fundamental requirement of due process is an opportunity to be heard, and when derelict parties fail to follow court orders they should be notified before being dismissed. Harris v. Callwood, 844 F.2d 1254, 1255-56 (6th Cir. 1988) (citation omitted).

In the instant case, Mr. Andress has been given ample opportunity at every stage of this procedure to be heard. On June 28, 1991, the Plaintiff brought a grievance claim under Article 15 of the National Agreement between the Postal Service and the Mailhandler's Union and subsequently appealed that decision to the MSPB. On August

23, 1991 a hearing was held by the MSPB on the Plaintiff's action. The Adjudicating Official issued the initial decision affirming the agency decision on November 5, 1991. The Plaintiff filed objections on November 27, 1991 and a formal petition for review on December 10, 1991. On April 22, 1992 the MSPB denied Plaintiff's petition for review. This left Plaintiff with the final option to file before the Equal Employment Opportunity Commission or file a civil action with this court. Mr. Andress filed Complaint No. C-1-92-417 with this Court on May 15, 1992. When the Plaintiff failed to follow the proper procedures the Magistrate Judge notified him, sent him a complimentary copy of Rule 4, and gave him 20 days to perfect service, which he failed to do. Through all these procedures it is evident that the Plaintiff had numerous opportunities and took full advantage of most of these opportunities to be heard. Therefore, the Court finds there has been no violation of due process.

B. Equitable Tolling

The Plaintiff also claims that equitable tolling should apply in this case. Chapter 5 of the United States Code, section 7703, governs judicial review of decisions of the MSPB. 5 U.S.C. § 7703 (b) (2) provides in pertinent part:

> Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the civil Rights Act of 1964 . . . . Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(emphasis added). Mr. Andress alleges that the 30 day period is subject to equitable tolling, and thus, his filing of the second action was timely. We disagree.

The Sixth Circuit has held that

> [T]he 30 day limitations period for filing an appeal under 5 U.S.C. § 7703(b)(2) is a jurisdictional prerequisite to judicial review of an MSPB decision and cannot be extended. Thus, once the appellant failed to file his action within the 30 day limitation period, the district court properly dismissed the case for lack of jurisdiction.

Dean v. Veterans Admin., 943 F.2d 667, 669 (6th Cir. 1991) (quoting Hilliard v. United States Postal Service, 814 F.2d 325, 327 (6th Cir. 1987) (holding that a person who filed on the 31st day (Monday) because Sunday was the 30th day failed to meet the jurisdictional requirements and tolling was not appropriate)).

In Dean, the Sixth Circuit held this but then reversed the district court on other grounds. In that case the Plaintiff was proceeding in forma pauperis and was in the courthouse with complaint in hand before the thirty day period expired. 943 F.2d at 670. Mr. Dean, however, was at the mercy of the court because his complaint could not be immediately accepted for filing since he sought to file his complaint in forma pauperis. The Sixth Circuit found that Mr. Dean did all he could to comply with the statute,

but was at the mercy of the court's speed and this caused him to miss the deadline. Id. The Sixth Circuit held "that a complaint is filed when it along with an application to proceed in forma pauperis are presented to the clerk's office and the clerk's office takes possession of the complaint and the application is granted." Id. at 671. Therefore, while the Sixth Circuit reversed they did not find that there should be equitable tolling.

Furthermore, the present case is distinguishable. Mr. Andress had ample opportunity to originally file his complaint and did within the thirty day limitation. In fact, when he failed to properly serve the parties the Magistrate Judge granted him an extra twenty days to perfect service. Now

Mr. Andress is attempting to file his complaint for a second time well past the thirty day limit, because he erred in his first attempt. The Federal Rules of Civil Procedure were created to be followed by all litigants, those represented by counsel as well as those preceding pro se. Mr. Andress ignored the Magistrate Judge's request the first time around and now seeks to get around it by refiling his complaint. In Dean, the Sixth Circuit found that the Plaintiff filed on time, while Mr. Andress second complaint is not anywhere close to timely. Because there is no equitable tolling of the statute, Mr. Andress second complaint must be dismissed. Furthermore, even if there was equitable tolling, it would not apply where the Plaintiff ignores a Court's order to follow the rules and then once his case is dismissed proceeds to re-file it.

CONCLUSION

Accordingly, the Court finds that under Rule 60(b) (4) of the Federal Rules of Civil Procedure this Court had both personal jurisdiction and subject matter jurisdiction. Additionally, the Court finds that the Plaintiff has been given numerous opportunities to be heard; and therefore, the Plaintiff's right to due process of law has not been violated. Finally, the Court finds that equitable tolling does not apply to

5 U.S.C. § 7703(b) (2), and even if the statute could be tolled, the Plaintiff would not be entitled to it in this case.

Therefore, we conclude that the Plaintiff's motion to vacate void judgment (doc. 26) should be DENIED, and this action is hereby DISMISSED.

SO ORDERED.

Dated: Oct. 18, '94

/s/ S. Arthur Spiegel
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EDWARD J. ANDRESS,	:	No. C-1-93-207
Plaintiff,	:	
v.	:	ORDER DENYING PLAINTIFF'S MOTION TO REVIEW AND REJECT MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
POSTMASTER GENERAL, MARVIN T. RUNYON	:	
Defendant	:	

This matter is before the Court on the Plaintiff's Motion to Review and Reject the Magistrate's Judge's Report and Recommendation (doc. 22), the Plaintiff's amended Motion To Review and Reject the Magistrate's Judge's Report and Recommendation (doc. 23), and the Defendant's response (doc. 24).

We have reviewed this matter de novo and agree that the instant action is duplicative of the Plaintiff's earlier action (Case No. C-1-92-417) which was filed in this Court on May 15, 1992 and thereafter dismissed on March 3, 1993, for failure to perfect service of process. In that case the Plaintiff was given ample instruction and opportunity by the Magistrate Judge to perfect service on the Defendant. The district court affirmed the Magistrate

Judge's dismissal of the case and that decision was affirmed by the United State Court of Appeals for the Sixth Circuit.

The fact that the Plaintiff has now refiled his complaint does not cure the service defects in the earlier filed case. Thus, the instant action was not timely filed. We further note that the Plaintiff has not

supported his claim of equitable tolling with any legal support.

We not that pro se pleadings are to be reviewed indulgently, and we have done so here. We also acknowledge that the result of this decision and the decisions under review may appear harsh to the Plaintiff. However, the Plaintiff's pro se status can not be viewed as a license to avoid the federal rules of civil procedure as well as the statute of limitations. Thus, despite the indulgence with which we view pro se pleadings, we are unable to ignore the defects in this case.

Accordingly, we conclude that the Report and Recommendation (doc. 21) should be AFFIRMED, and that the Defendant's Motion for Summary Judgment be GRANTED and the Plaintiff's complaint be DISMISSED WITH PREJUDICE. The Plaintiff's Motions to Review the Magistrate Judge's Findings and Memorandum of Law is hereby DENIED, and this action is DISMISSED WITH PREJUDICE.

SO ORDERED.

Dated: 03/28/94

/s/ S. Arthur Spiegel
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EDWARD J. ANDRESS,
Plaintiff,

vs Case No. C-1-93-207

MARVIN T. RUNYON
POSTMASTER GENERAL
UNITED STATES POSTAL SERVICE
Defendant.

REPORT AND RECOMMENDTION

This case is before the Court upon defendant's motion for summary judgment (doc. 3), plaintiff's motion to strike (doc. 4), plaintiff's motion for summary judgment (doc. 8), plaintiff's motion for preliminary injunction (doc. 14), and following a hearing on said motions.

In 1989, plaintiff filed an action in this Court against the Postmaster General, claiming handicap discrimination. *See Andress v. Frank*, Case No. C-1-89-511. Prior to trial, on December 12, 1990, this case was settled.

On June 14, 1991, plaintiff was removed from his postal employment due to an altercation with a

black employee, Charles Worsham. Plaintiff who is white, challenged his removal on the basis of handicap and race discrimination. He pursued his case before the Merit Systems Protection Board (MSPB), which denied his claim after a hearing. On April 22, 1992, the MSPB denied plaintiff's petition to review its November 27, 1991 decision. Also on April 22, 1992, the

MSPB notified plaintiff that, if he did not request a review by the Equal Employment Opportunity Commission, he must file any civil action in this Court no later than thirty calendar days after receipt of the notice.

On May 15, 1992, plaintiff filed a timely action against the Postal Service and four employees, challenging his removal as resulting from handicap and race discrimination. *See Andress v. United States Postal Service*, Case No. C-1-92-417. Subsequently, Andress dismissed the four employees and file amended complaints. On August 21, 1992, the United States Department of Justice filed a suggestion of improper service on the remaining defendant. The Magistrate Judge ordered Andress to show cause why his complaint should not be dismissed. After Andress responded that he had served the U. S. Attorney's Office, the Magistrate

Judge advised Andress that, under Fed. R. Civ. P. 4(d)(5), he was required to serve both the United States as explained in Fed. R. Civ. P.4(d)(4) as well as the Postal Service. Attached to the order was a copy of Rule 4. Andress was ordered to properly serve the United States Postal Service within twenty days of receipt of the order and provide the Court with proof of service within thirty days. He was advised that if he failed to comply with the order, defendant's motion to dismiss would be granted. On December 23, 1992, Andress filed a "notice of bona fide attempt to serve process on the United States Postal Service," stating that he had sent by certified mail, with return receipt, a copy of a summons and complaint to the Postmaster General in Washington, D.C. The Magistrate Judge determined that Andress had not effected service of process and had not show good cause to excuse his failure. He recommended dismissal with prejudice and, on March 3, 1993, the District Judge adopted the report and recommendation. Andress appealed this ruling, and the United State Court of Appeals for the Sixth Circuit affirmed the District Court's finding that Andress failed to perfect service of process on the Attorney General within 120 days of filing his complaint and there was no good cause shown for his failure. *Andress v. United States Postal Service*, No. 93-3391 (6th Cir. Oct. 21, 1993).

While plaintiff's appeal was pending in District Court case no. C-1-92-417, he filed the instant action, which contains the same claim. Defendant's motion for summary judgment asserts this case should be

dismissed because it was not filed within the thirty day time period after the MSPB decision. At the hearing, plaintiff, who appeared pro se, demonstrated that he is an intelligent person who clearly grasped the legal issues and was capable of understanding both the Magistrate Judge's instruction given in case no. C-1-92-417 as well as the requirements of Rule 4. Both this Court and the Sixth Circuit have already determined that plaintiff has failed to show good cause for perfecting service of his complaint in a timely manner. Filing the complaint again in a new case does not cure this defect. This Court has already stretched the time limits of Rule 4 in case no. C-1-92-417 to give plaintiff an opportunity to perfect service, and he failed to do so. Plaintiff claims that the Court should consider equitable tolling, but he has provided no evidence that would support equitable tolling. Furthermore, equitable tolling is not applicable to this case. *See Dean v. Veterans Admin. Regional Office*, 943 F.2d 667, 669-70 (6th Cir. 1991).

Plaintiff's most recent complaint does not relate back to the date of his complaint in case no. 92-417. Id. The 30 day limitation period in 5 U.S.C. § 7703(b)(2) is jurisdictional and not subject to equitable tolling. Id; *Hilliard v. United States Postal Service*, 814 F.2d 325, 327 (6th Cir. 1987). Therefore, the instant complaint must be dismissed.

IT IS THEREFORE RECOMMENDED THAT:

1. Defendant's motion for summary judgment be GRANTED and plaintiff's complaint be dismissed with prejudice; and

2. Plaintiff's motions to strike, for summary judgment, and for preliminary injunction be DENIED.

Date: 02/02/94

/s/ Robert A. Steinberg
United States Magistrate Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDWARD J. ANDRESS, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER CH07529106191 DATE: APR 22 1992

Leona Durham, Esquire, Cincinnati, Ohio, for the Appellant.

Helen A. Nicholas, Philadelphia, Pennsylvania, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's December 10, 1991, petition for review of the initial decision issued on November 5, 1991, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We also DENY the agency's motion to strike the appellant's submission

of December 10, 1991, and DISMISS as moot the agency's motion to strike the appellant's submission of November 27, 1991. In addition, we DENY the appellant's motion to strike the agency's response to the petition for review as untimely filed.

This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b) (1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7702(b) (1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file

a civil action against the agency on both your discrimination claims and your other claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b) (2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b) (2). If the action involves a claim of discrimination based on race, color, religion, sex, natural origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b) (1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b) (1).

FOR THE BOARD:

/s/ Robert E. Taylor
Clerk of the Board
Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

EDWARD J. ANDRESS, Appellant,	DOCKET NUMBER CH-0752-91-0619-I-1
v.	
UNITED STATES POSTAL SERVICE, Agency.	DATE: November 5, 1991

Leona Durham, Esquire, Cincinnati, Ohio, for the Appellant.

Richard L. Acker, Cincinnati, Ohio, for the agency.

BEFORE

Stephen E. Manrose
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant appealed from an action removing him on July 1, 1991 from the position of Mail Handler with the United States Postal Service, Cincinnati, Ohio. I held a hearing on August 23, 1991.

The appellant's appeal falls within the Board's appellate jurisdiction. See 5 U.S.C. §§ 7511(a)(1)(B), 7512(1), 7513(d). The agency's action is hereby AFFIRMED.

ANALYSIS AND FINDINGS

Merits of the Agency's Charge

The appellant's removal was based on a charge titled "Assaulting a Postal Employee." The supporting specification

alleges that at approximately 11:30 p.m. the appellant struck employee Charles Worsham in the left side of the face and kicked him in the groin.

Charles Worsham, Forklift Operator, testified that he was driving his forklift on the night in question when he stopped to check two skids he was carrying to make sure that they had not shifted. He stated that as he was climbing down from the forklift, the appellant walked toward him and stated "Mother f____r," do you have a problem?" (Tr. 10, 11, 40, 41). He further testified that when he got off the forklift the appellant swung at him with a clenched fist, striking him on the left side of his face, and that the appellant also kicked him in the groin (tr. 11, 12). He stated that he did not hit the appellant with his forklift, nor did he otherwise strike or provoke the appellant (Tr. 45). He further stated that he had not argued with the appellant nor did they have any cortact with each other earlier that day (Tr. 13, 45).

Mr. Worsham testified that following the incident he went to the Hospital to have his face examined and that he subsequently had his face examined on three other occasions (Tr. 14). He also stated that he filed criminal charges against the appellant and that those charges are still pending (Tr. 17).

The appellant testified that he started work at 3:00 p.m. on the day in question and that he first encountered Mr. Worsham at about 10:30 p.m. that same night when he was walking with John Bradford. He stated that they observed Mr. Worsham driving his forklift so recklessly that Mr. Bradford had to jump out of the way to avoid it (Tr. 251). The appellant stated that shortly after this incident Mr. Worsham rudely advised him that he needed to turn into an area with his forklift (Tr. 253).

The appellant testified that the incident in question occurred following his third encounter that day with Mr. Worsham. He stated that the forklift "made contact" with him as Mr. Worsham was back up, whereupon he asked Mr. Worsham, "Do you have a problem, mother f____r?" (Tr. 255, 256). He stated that Mr. Worsham then became enraged, started to climb down from the

forklift, and shoved the appellant out of the way to complete his climb down from the forklift (Tr. 256, 257). The appellant testified that he then slapped Mr. Worsham in reaction to the shove, whereupon Mr. Worsham punched him under his ear by the corner of his jaw (Tr. 257). He stated that he then kicked Mr. Worsham to keep him away (Tr. 258, 259).

Dennis Gurley, Mail Handler, testified that on the night in question he was standing about twenty to twenty-five feet from Mr. Worsham's forklift cleaning out a mail container when he thought he saw the appellant walk behind him (Tr. 57, 58). He stated that he then heard a punch, whereupon he quickly turned his head around and saw Mr. Worsham's head recoil as if he had been struck by the appellant (Tr. 58). He stated that Mr. Worsham looked shocked and surprised and that he had to be restrained from attacking the appellant (Tr. 59, 60, 66). HE further stated that he did not hear or see any evidence that Mr. Worsham had struck the appellant with his forklift (Tr. 66).

Mr. William Powell, Jr., Mail Handler, testified that he was about ten to fifteen feet away from the appellant and Mr. Worsham at the time of their confrontation (Tr. 77). He stated that he heard a thump and looked up to see the appellant's fist close to Mr. Worsham's face and Mr. Worsham's face

recoiling from the blow (Tr. 85, 86). He stated that based on this observation he concluded that the appellant punched Mr. Worsham with a closed rather than open hand (Tr. 86). He stated that he also observed the appellant try "this little kick move" (Tr. 79).

He stated that he grabbed Mr. Worsham to ask him if he was all right and to calm him down and restrain him from attacking the appellant (Tr. 79, 80). He further stated that he did not see Mr. Worsham hit the appellant with his forklift nor did he otherwise see him strike or provoke the appellant (Tr. 80 - 82). He observed that Mr. Worsham's face was "pretty swollen" after the incident (Tr. 87).

David Grosser, Mail Handler, testified that he noticed "some kind of commotion" and that he then saw the appellant kick Mr. Worsham in the area of his bladder (Tr. 104). He stated that he

did not see Mr. Worsham strike the appellant at any time (Tr. 104). He further testified that Mr. Worsham appeared "angry and quite upset" (Tr. 107).

The appellant's contention that Mr. Worsham hit him during the confrontation is not corroborated by any eyewitness testimony. In addition, the appellant's testimony that Mr. Worsham struck him in the face after he slapped Mr. Worsham is apparently inconsistent with the appellant's prior written

statement in which he made no mention of Mr. Worsham's alleged action in hitting him after he slapped Mr. Worsham. In the appellant's written statement, he only stated that Mr. Worsham "struck me and I struck him back" (Agency Response Fiel: Tab 4L). The apparent inconsistency between the appellant's present testimony before this Board and his prior written statement detracts form the credibility of the appellant's statements regarding this matter. *See Hillen v. Department of Army*, 35 M.S.P.R. 453, 459 (1987).

The appellant does admit that he used the referenced abusive language in addressing Mr. Worsham and that he also slapped him. He contends, however, that Mr. Worsham provoked the incident by the manner in which he drove the forklift and also by shoving the appellant out of the way when he got off the forklift. He therefore argues that, "at best," both he and Mr. Worsham were "equal participants" in the matter (Tr. 312).

There is some evidence in this record that indicates Mr. Worsham could have used more care in driving his forklift on the night in question. The appellant's testimony regarding the incident with Mr. Bradford is supported by the testimony of Mr. Bradford himself who stated that he did in fact have to jump out of the way of the forklift driven by Mr. Worsham earlier that night (Tr. 228). Even assuming

that this particular incident occurred as alleged by MR. Bradford and the appellant, it does not constitute provocation for any later physical retaliation by the appellant. The appellant's action in hitting MR. Worsham occurred almost one hour later. Moreover, the record indicates

that Mr. Bradford rather than the appellant was endangered by this prior incident.

I also find that Mr. Worsham's alleged rude language to the appellant regarding Mr. Worsham's desire to turn the forklift into a certain work area did not constitute sufficient provocation to lessen the seriousness of the appellant's later action in hitting Mr. Worsham. This alleged second incident apparently also occurred, according to the appellant's statements, more than one-half hour before the incident described in the agency's assault charge. More significantly, even assuming that an incident similar to that described by the appellant did occur, the appellant's later retaliatory response was grossly disproportionate to any comments made by Mr. Worsham.

The appellant also asserts that Mr. Worsham provoked him by brushing against him with the forklift and shoving him as he got down off the forklift immediately prior to the hitting incident at issue here. Neither of these assertions, however, are

corroborated by the testimony of any of the eyewitnesses, and they are denied by Mr. Worsham. To the extent that the forklift touched the appellant, I find that such touching was light in view of the lack of any injury to the appellant. In addition, there is no evidence that any such touching resulted from intentional conduct by Mr. Worsham. To the extent that the appellant felt endangered or was otherwise displeased by Mr. Worsham's driving of the forklift, he should have lodged a complaint against Mr. Worsham with some appropriate supervisory authority. The alleged brushing of the forklift driven by Mr. Worsham against the appellant, even assuming that it occured, did not justify any subsequent physical retaliation by the appellant.

The shoving incident, as related by the appellant himself, occurred after the appellant used abusive language directed at Mr. Worsham as Mr. Worsham was attempting to get off the forklift. Because the appellant admitted that to get off the forklift Mr. Worsham had to shove him out of the way (Tr. 256), I find that any physical contact that occurred when Mr.Worsham got

off the forklift was created by the appellant himself when he stood in Mr.Worsham's way.

All witnesses, including the appellant, then agree the appellant hit Mr. Worsham with a loud

blow to the face. Mr. Worsham testified that the appellant hit him with a closed fist. His testimony is supported in particular by the statement of Mr. Powell. Mr. Powell, a well-built, athletic young man, testified that he had boxing experience and could tell from the sound of the blow as well as by his observation of the appellant's fist shortly after the blow was struck that the blow was with a closed rather than open hand. It is also supported by the testimony of Mr. Gurley who stated that the blow sounded like a "punch". I find that Mr. Worsham's testimony, as supported by the testimony of these other witnesses, establishes that the appellant hit Mr. Worsham in the face with a closed rather than open hand.

Mr. Worsham understandably attempted to retaliate against the appellant after the appellant punched him. It was therefore necessary for Mr. Worsham to be physically restrained, while the appellant, according to the testimony of Mr. Gurley, did not need to be restrained (Tr. 59). Had Mr. Worsham rather than the appellant been the aggressor, as the appellant indicated in his testimony, I find that more likely than not the appellant would have attempted to retaliate against Mr. Worsham. Mr. Worsham's action in filing a criminal complaint is also consistent with his testimony that the appellant rather than himself was the aggressor.

The record also contains undisputed evidence that the appellant kicked Mr. Worsham. Even assuming I credit the appellant's testimony that he merely kicked Mr. Worsham to keep him away after he had already hit Mr. Worsham, I find that this conduct constituted further unwelcome and uninvited contact with Mr. Worsham's body and that it is supportive of the agency's assault charge.

There is some evidence that the appellant's conduct as described in this charge is consistent with at least one other incident that occurred shortly before this incident. Leonard

Adams, Supervisor of Mails, testified that on April 29, 1991, the appellant "chucked me with his arm or he hit me with his hand" as they passed each other. He stated that this action by the appellant resulted in a confrontation between the two of them (Tr. 205, 206). Evidence regarding this prior incident was introduced into the record at the insistence of the appellant. Although it is of limited probative value regarding the issue under consideration here and is not necessary to my finding below that the current charge against the appellant is supported by preponderant evidence, it does establish a likelihood that the appellant has a propensity for physically striking other individuals in an uninvited and unwelcome manner. Accordingly, this evidence

does add further limited support for the current charge.

I find, in summary, that the agency has supported by preponderant evidence its charge that the appellant assaulted Mr. Worsham. There is an inherent relationship between this conduct and the efficiency of the service so that the agency's disciplinary action was imposed based on proper cause. *See Blackford v. Department of the Navy*, 8 M.S.P.R. 712, 714 (1981). There is also proof that the Postal Service suffered actual damages because as a result of this incident it was required to pay Mr. Worsham's medical bills (Tr. 155-157). The appellant's conduct was therefore prejudicial to the interests of the Postal Service and violated the agency's code of ethical conduct (Agency Response File: Tab 4q). I find, in short, that the charge is sustained.

Affirmative Defenses

The appellant raises several affirmative defenses to the agency's action on appeal. He contends, inter alia, that the agency committed a harmful procedural error by not thoroughly investigating the current charge against him.

The agency obtained eyewitness statements shortly after the incident occurred that are contained in the agency's response file. The appellant has not shown that the agency was required to conduct a more extensive or thorough investigation

into the incident before it removed him, and I therefore find no evidence that it committed a procedural error in this regard. He further has not shown that any such error was harmful in that the error likely caused a different result to be reached in his case. I therefore find that he has not supported the allegation of harmful procedural error by preponderant evidence. 5 C.F.R. § 1201.56(a) (2) (iii), (b) (1), (c) (3) (1991).

The appellant also alleges that the agency's action discriminated against him because of a handicapping condition ("service-connected stress condition"). He submitted a January 8, 1991 statement from Dr. Eugene Somoza, M.D., who stated that the appellant has "post-traumatic stress," that he functions "fairly well" in his job, and that he uses counseling to help him tolerate a "stressful environment on the job" (Administrative File: Tab 7).

The appellant provided confusing testimony regarding whether this condition, which he stated occurred based on his service in the Vietnam war, caused him to strike Mr. Worsham. He initially denied that there was any causal connection between this condition and his action striking Mr. Worsham and stated that instead it was the "military experience" that caused him to hit MR. Worsham (Tr. 290). He testified, in that regard, that it was possible

for anybody who had served in he military to have reacted the same way he reacted in this case (Tr. 292). He then stated that because "management" created a stressful situation, he acted out in a "controlled hostile response" (Tr. 292).

As a part of the appellant's burden of proof, he must first establish that he has a handicapping condition. *See Kelly v. Department of Health and Human Services*, 46 M.S.P.R. 358, 361 (1990). The mere existence of a mental or physical impairment is insufficient to constitute proof of a handicapping condition. The appellant must also show that this impairment substantially limits one or more of his major life activities, that he has a record of such impairment, or that he is regarded as having such an impairment. *See Jones v. Department of the Navy*, 48 M.S.P.R. 117, 121 (1991). The fact that an impairment prevents an

employee from meeting the demands of a particular job does not mean that the employee is handicapped in the absence of evidence showing that the handicap generally forecloses the type of employment involved. *See Cohen v. Department of the Army*, 46 M.S.P.R. 369, 374 (1990).

Even assuming that this appellant has a mental impairment, he has not shown that any of his major life activities, including his ability to work at the

type of employment represented by his former position at the Postal Service, are substantially limited by the impairment. Dr. Somoza, in fact, stated that the appellant was able to function "fairly well" in his position. Because the appellant has not shown that he has a handicap, his allegation of handicap discrimination cannot be sustained. *See Kelly v. Department of Health and Human Services*, 46 M.S.P.R. at 361. I do not reach the issue of whether the appellant has established other necessary elements of proof in a case of handicap discrimination, including, inter alia, whether he is a "qualified" handicapped employee, the issue of whether his condition was accommodated by the Postal Service, and the issue of whether the alleged handicapping condition caused the conduct at issue.

The appellant also alleges that the agency's removal action in this case was in reprisal for an EEO complaint he filed on or about April 30, 1991. He has the burden of establishing that he engaged in a protected activity, that the accused official knew of the activity, that the adverse action could have been issued in retaliation under the circumstances, and that there was a genuine nexus between the alleged retaliation and the adverse action. *See Mack v. United States Postal Service*, 48 M.S.P.R. 617, 622 (1991).

The appellant did not show that either the proposing or deciding official in this removal action had any knowledge of an EEO complaint filed by the appellant (Tr. 183, 207). At the hearing, the appellant apparently amended his allegation by stating that he instead spoke to an EEO Counselor on or about April 30, 1991 (Tr. 243). Proposing official Leonard Adams

stated that the appellant may have requested to speak to an EEO counselor on that day (Tr. 210). The record, however, does not establish that the deciding official, Mr. William Thompson, General Supervisor, was aware of the appellant's April 30 visit to an EEO counselor.

Because Mr. Thompson decided to remove the appellant and he was unaware of the appellant's alleged protected activity, this record indicates that that protected activity did not influence his decision. Even assuming that he was aware of the appellant's EEO counseling visit and that that visit constituted a protected activity, the appellant did not establish the existence of a genuine nexus between that activity and his subsequent removal. Mr. Thompson credibly testified that the appellant's removal was based solely on the assault charge that formed the basis for that action. Although the appellant argues that there was a short time between the date the

appellant visited the EEO counselor and the date he was removed, the agency had no control over the date the appellant chose to assault a co-worker, and its ensuing disciplinary action was based on a legitimate, non-retaliatory reason. Furthermore, the appellant had submitted prior EEO complaints and grievances, over a period of several years prior to this removal (Administrative File: Tab 7), and he has not shown that his visit to an EEO counselor on April 30, 1991 precipitated the present removal action. For all these reasons, I find that he has not supported his reprisal allegation by preponderant evidence. It is therefore not sustained.

Penalty

The sustained charge against the appellant is very serious. The Board has held that mitigation of a removal penalty for an assault on another employee may be appropriate when (1) no serious injury results, (2) no weapons are used, (3) the employee has a history of satisfactory performance, (4) the agency does not rely on a past disciplinary record in selecting the penalty, and (5) there is an element of provocation. *See Faucher v. United States Postal Service*, 41 M.S.P.R. 336, 339 (1989). Under this method of analysis, there is no basis for mitigation of the

removal penalty in this case. I have found that Mr. Worsham's actions were not sufficient to provoke a reasonable person to assault him. I therefore find that an element of provocation did not exist.1/

Mr. Thompson testified that the Postal Service considers assault to be an offense that warrants removal (Tr. 163, 171). The record also shows that the appellant signed a statement when he was appointed to the Postal Service in 1983 which warned him that the postal Service imposes "severe action[s]" for those who commit physical assaults (Agency Response File: Tab 4N). This evidence indicates that the agency penalty in this case is consistent with the penalties imposed in similar cases and establishes that the appellant was placed on notice concerning the possibility he might be removed if he committed an assault on a fellow employee. I further that the Board has upheld removal actions in comparable cases. *See*

1/ I do not reach the issue of whether the injury inflicted upon Mr. Worsham, which required medical treatment, was "serious." I also do not reach the issues of whether the appellant has a history of satisfactory period or the extent to which the appellant's past disciplinary record should be considered. With respect to this latter issue, I note that although the agency did not cite any past disciplinary record in its removal notice, the appellant himself introduced evidence that he has an extensive past disciplinary history including at least three formal disciplinary actions for various reasons that were taken within six month prior to the date he was removed (Administrative File: Tab 7).

Bree v. Department of Health and Human Services, 49 M.S.P.R. 68, 72 (1991) (removal upheld based on one sustained charge of striking a co-worker in the face with a fist).

The appellant argues that imposition of the removal action in this case constitutes disparate treatment because Mr. Worsham was not also removed. Because Mr. Worsham did not assault the appellant, I find no disparate treatment and conclude that this allegation does not warrant a reduction in the agency's removal penalty.

I find that there are no other circumstances here that warrant a reduced penalty. The record does not indicate that the

appellant has a particularly lengthy or distinguished record of employment with the Postal Service. His actions in this case were intentional and his rehabilitative potential is questionable because although he indicated that he was sorry for the incident, he has continued to defend his actions on the basis that they were "what [he] had to do to get out of a hostile situation" (Tr. 267). I further find that no mitigating circumstances exist that are sufficient to warrant a reduction in penalty. Although the appellant argues that his medical condition constitutes a mitigating circumstance that lessens the seriousness of his actions, I find that he has not

supported that argument with any persuasive evidence, including evidence that he suffers from a handicapping condition. Even assuming some degree of mitigation would be appropriate under the circumstances of this case, the record does not show that such mitigation is so significant in nature that it warrants a reduction in the agency penalty.

I find, in summary, that the agency's decision removing the appellant was reasonably imposed. I therefore decline to mitigate the removal penalty. See Douglas v. Veterans Administration, 5 M.S.P.R. 280, 306 (1981)

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Stephen E. Manrose
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on December 10, 1991, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission

APPENDIX H

5 USCS § 7701. Appellate Procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

5 USCS § 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who--

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by--

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16 [42 USCS § 2000e-16]),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791 [29 USCS § 791]),

the board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title [5 USCS § 7701] and this section.

(2) In any matter before an agency which involves--

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency shall be judicially

reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

5 USCS § 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(2) Cases of discrimination subject to the provisions of section 7702 of this title [5 USCS § 7702] shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)) [42 USCS §§ 2000e-16(c), 29 USCS §§ 633a(c), 216(b)], as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702 [5 USCS § 7702].

18 USCS § 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
(June 25, 1948, ch 645, § 1, 62 Stat. 749.)

28 USCS § 1254. Court of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

29 USCS § 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) **Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees.** No otherwise qualified individual with handicaps in the United States, as defined in section 7(8) [29 USCS § 706(8)], shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by ;the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(3) **Depriving persons of rights or privileges.** If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or

for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws;. . .if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 USCS § 2000e-2. Unlawful employment practices

(a) **Employer practices.** It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

42 USCS § 2000e-3. Other unlawful employment practices

(a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.** It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or restraining, including on-the-job training programs, to discriminate against any individual, or for a labor

organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-2000e-17].

42 USCS § 2000e-11. Veterans' preference

Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

42 USCS § 2000e-16. Appellate Procedures

(c) **Civil action by party aggrieved. Within** thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS § 2000e-5], in

which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

O.R.C. § 2913. Assault

(A) No person shall knowingly cause or attempt to cause physical harm to another.

(B) No person shall recklessly cause serious physical harm to another.

(C) Whoever violates this section is guilty of assault, a misdemeanor of the first degree.

29 CFR § 1613.641. Statutory right.

(a) An agent who has filed a complaint or a claimant who has filed a claim for relief based on race, color, religion, sex, and/or national origin discrimination is authorized to file a civil action in an appropriate U.S. district court:

(2) After 180 calendar days from the date he/she filed a complaint or claim with his/her agency if there has been no decision on the complaint or claim;

APENDIX I

P 742 552 303

Certified Mail Receipt
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Sent to: Darrel Brown EEO	
Street & No.: 1591 Dalton St.	
P.O., State & ZIP Code: Cincinnati, O. 45234-9411	
Postage: ENV.	$ .34
Certified Fee	1.00
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.00
Return Receipt Showing to Whom, Date, & Address of Delivery	
TOTAL Postage & Fees: CINTI. OH	$ 2.34
Postmark or Date: OCT 29 1991	

PS Form 3800, June 1989

RENDER:
- Complete items 1 and/or 2 for additional ser
- Complete items 3, and 4a & b.
- Print your name and address on the reverse s
that we can return this card to you.
- Attach this form to the front of the mailpiece
back if space does not permit.
- Write "Return Receipt Requested" on the ma
the article number.

3. Article Addressed to:
Darrel Brown
EEO
1591 Dalton St.
Cinti. O. 45234-9411

4a. Article Number
742 552 303

4b. Service Type
☐ Registered ☐ Insured
☑ Certified ☐ COD
☐ Express Mail ☑ Return Receipt for Merchandise

7. Date of Delivery

5. Signature (Addressee)
Darrell Brown

6. Signature (Agent)

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, October 1990 *U.S. GPO: 1990—273-801 DOMESTIC RETURN RECEIPT

BEST AVAILABLE COPY